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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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FILE: [REDACTED]
SRC 09 800 08824

Office: TEXAS SERVICE CENTER Date:

MAR 16 2010

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Mari Plunson
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time he filed the petition, the petitioner was a research scientist at Howard University, Washington, D.C., pursuing research at the nearby National Institute of Standards and Technology (NIST) in Gaithersburg, Maryland. The petitioner subsequently accepted employment at the University of Maryland (UM), where he had previously earned his doctorate. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and an additional witness letter. Counsel states that the director “[f]ailed to issue a Request for Evidence to grant applicant/petitioner the opportunity to respond.” Under the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 103.2(b)(8)(ii), issuance of a request for evidence is discretionary. Therefore, the director’s failure to issue such a request is not, itself, grounds for appeal. Any new evidence that the petitioner could have submitted in response to a request for evidence could instead be submitted on appeal, and therefore there has been no violation of the petitioner’s due process rights.

Section 203(b) of the Act states, in pertinent part:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer --

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien’s services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term “national interest.” Additionally, Congress did not provide a specific definition of “in the national interest.” The Committee on the Judiciary merely noted in its report to the Senate that the committee had “focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . .” S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now USCIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the “prospective national benefit” [required of aliens seeking to qualify as “exceptional.”] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien’s past record justifies projections of future benefit to the national interest. The petitioner’s subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term “prospective” is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines “exceptional ability” as “a degree of expertise significantly above that ordinarily encountered” in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on January 15, 2009. In a statement accompanying the initial filing, the petitioner stated:

Currently I work at the *National Institute of Standards and Technology (NIST)* on developing advanced characterization methods for nanoparticle-substrate interaction under the direction of [REDACTED].

[I studied in] the Department of Materials Science and Engineering at the *University of Maryland*, where I worked in the lab of [REDACTED] researching the field of nanostructured materials and nano-biotechnology research area. I received my Ph.D. degree in 2006 and my dissertation for Ph.D. was on “chitosan-mediated *in situ* biomolecule assembly in completely packaged microfluidic devices for bioMEMS (Bio-Micro Electro Mechanical System).” BioMEMS device, a miniaturized bio-chemical analysis system, has the potential to revolutionize our daily life. This device integrates one or several laboratory functions on a single chip and enables massive parallelization which allows high-throughput analysis. . . . In this research project, my target was assembling biological components in microfluidic devices in their active forms with spatial selectivity. . . . I employed a microfluidic system with new sealing technology so we could control and analyze bio-chemical species in solution and exploited [the] biopolymer chitosan as the biomolecule assembly scaffold in microfluidic system to achieve such a goal. . . .

In 2006, I was offered a research scientist position in the *NIST*. . . [REDACTED] group . . . has focused on the fate of nanoparticles in biological systems. . . . [N]anoparticles are the leading candidates as a new drug delivery system and biological imaging agent. . . . However, there are a number of unknown characteristics of nanoparticles such as toxicity, adsorption, and agglomerations etc. . . . My present research interest in this project is in understanding the interactions of nanoparticles and synthetic/biological surface and developing the measurement technology for the characterization of the nanostructured material properties which certainly are in the national interest of the United States. . . . The progress of the project has been promising and the results from this research will surely answer integral questions about the source and mechanisms of nanoparticle-biological materials interactions.

(Emphasis in original.) The petitioner did not mention Howard University in his statement, but according to USCIS records, Howard University was the only entity authorized to employ the petitioner at the time he filed the petition. (On the Form I-140 petition, the petitioner identified Howard University as his intending employer, and a 2009 journal article in the record shows his affiliation with the university.)

Eight witness letters accompanied the petitioner’s initial submission. [REDACTED] of Hongik University, Seoul, South Korea (where the petitioner earned his bachelor’s degree), stated:

I have known [the petitioner] for about 14 years, who [*sic*] came to the Department of Materials Science & Engineering at *Hongik University* (Seoul, Korea) in 1994. . . .

I followed with great interest [the petitioner's] career accomplishments in the United States and saying that he has surpassed my highest expectation is nothing short of an understatement. . . . He has contributed towards the advancement of the biosensor field by pioneering the incorporating [of] biological materials in microfluidic systems. Conventional methods to add biological components to micro scale devices encounter limitations such as arduous chemical procedure[s] and dry environment that may destroy activities of the biological component being assembled. . . . His design and method in his research certainly overcame such limitations and it is difficult to overstate the extreme importance of the research which he investigated.

(Emphasis in original.) [REDACTED] stated: "I have known [the petitioner] for about 7-8 years, who [*sic*] came to the University of Maryland in 1999 and joined my group somewhat later." The suspect grammar of this sentence closely matches that of the first quoted sentence in [REDACTED]'s letter, above, suggesting common authorship of the letters.

[REDACTED] continued:

[The petitioner] is very much **accomplished in two very different areas**, semiconductor materials and processing on one hand, and biomaterials and biomicrosystems (bioMEMS) on the other. . . .

[The petitioner participated] in the **processing and characterization of nanoporous low-K materials for advanced semiconductor interconnects**. . . . [H]e developed a detailed picture of the thermal transformations in these new materials takes place [*sic*]. . . .

His creativity and persistence in achieving the bioMEMS platform technology has placed us in a highly competitive position leveraged to address the complexity of multi-step, multi-site bioprocess sequences. . . . His work, particularly a key publication in *Lab on a Chip* – the prestigious journal of the field – became a key factor in the success of our ongoing program.

(Emphasis in original.) [REDACTED] at RMIT University, Melbourne, Australia, stated: "I do not know [the petitioner] personally," and "I have not worked directly with" the petitioner. Nevertheless, [REDACTED] letter contains language that appears to be closer to [REDACTED] letter than coincidence allows:

[The petitioner's] most significant contribution to this research is that he achieved the bioMEMS platform technology which leverages to address the complexity of multi-step, multi-site bioprocess sequences in a micro-fluidic biosensor. His work, particularly a

key publication in *Lab on a Chip* – the prestigious journal of the field – became a key factor in the success of the research project.

letter indicated that the petitioner “has a well-earned reputation as a scientist of the highest caliber,” but the original source of the wording of the letter is in doubt because of its similarity with other letters, supposedly written independently, in the record.

described the petitioner’s work in technical detail, stating that the petitioner’s “development of the reversibly sealed microfluidic system enables programmable assembly of chitosan and biomolecules at selected sites inside the microchannel. . . . [The petitioner’s] contribution to this research is significant and the bioMEMS template he developed is one of the key factors in our on-going bioMEMS research project.”

, a research scientist with Toshiba Corporation, Yokohama, Japan, stated:

[The petitioner] and I have spent almost 1 year together in a prestigious materials science group [at] the University of Maryland [under] During [that] time, [the petitioner] . . . productively attained plenty of outstanding research results. . . .

More recently, [the petitioner] became an expert in Quantum Dot technology at the NIST. . . . Quantum Dots are tiny semiconductor nanoparticles that . . . possess remarkable optical characteristics. . . . [The] outstanding research that [the petitioner] is [conducting] provides [an] extremely valuable opportunity to overcome [a] major barrier to widespread applications in nanoscale device fabrication and to develop more accurate and quantitative analysis for biomedical applications.

senior scientist at the Fondazione Bruno Kessler and an adjunct faculty member at UM, stated that the petitioner “collaborated with my laboratory from 2002-2006.” described the petitioner’s work in technical detail and stated that the petitioner is “one of a few scientists who are able to bridge basic research with nano-structured materials and biomaterials for subsequent applications to biological assay, drug delivery, diagnosis, and treatment in real world medicine.”

, a research scientist at NIST, stated:

[The petitioner’s] project relates to providing basic information relating to . . . understanding the physical basis of toxicological responses of nanoparticles in living systems, an issue of critical importance from the standpoints of human health and the US economy since many nanoparticle produc[t]s are coming to market without regulation of their environmental impact. This is a concern since many studies have shown that nanoparticles can disrupt many essential biological functions. . . .

Characterizing basic nanoparticle properties such as particle size and shape and the interaction of the particles with each other, proteins and surfaces is critical to

understanding the physical basis of the observed strong interaction of nanoparticles with biological systems. [The petitioner's] research directly pertains to this fundamental problem and he is currently developing a method of accurately measuring the strength of interactions between nanoparticles and substrates and with proteins.

[redacted] of Hanbat National University, Daejeon, South Korea, stated: "I believe that [the petitioner's] development holds significant implications as a simple and generic biomolecule assembly approach for future applications in complex biomolecular detection and analyses."

The letters, mostly from the petitioner's mentors and collaborators, show high opinions of the quality and importance of the petitioner's work, but they do not amount to objective assessments of the impact of that work. The witnesses did not show the extent to which other researchers have applied the petitioner's findings in their own work.

The petitioner submitted copies of ten published articles and conference abstracts, along with a database printout showing 25 citations of five of his articles. The most-cited article shows 11 citations; the remaining articles each show two to five citations. The printout does not identify the citing articles. The petitioner submitted copies of 13 citing articles, ten of which are from authors independent of the petitioner and his collaborators. The record does not establish the authorship of the other 12 citing articles mentioned in the database printout.

The director denied the petition on April 27, 2009, stating that the witness letters do not establish that the petitioner has been particularly influential in his field, and that the petitioner had "not demonstrated heavy independent citation of [his] work." On appeal, counsel refers to the petitioner as "a high level research scientist" but does not define the term. The petitioner appears to be a postdoctoral research associate, which is not hierarchically a "high level" research position. Such positions are, rather, advanced but temporary training to prepare a researcher for eventual permanent employment, and on the research "career ladder," postdoctoral researchers appear to be one rung above graduate students.

Three new letters accompany the appeal. [redacted] the petitioner's "direct supervisor," states:

[The petitioner's] contributions in the field of nanostructured materials engineering and MEMS have made possible critical and significant advances to these fields and demonstrate that he is a scientist with extraordinary ability. . . . During his time [at NIST, the petitioner] produced a number of important advances which have made a significant difference to areas such as quantum dots and carbon nanotubes.

[redacted] did not elaborate as to the nature or impact of the above work. The remainder of [redacted]'s letter concerns the petitioner's most recent work at UM, "develop[ing] the next generation of magnetostrictive nanowire" for the United States Navy. The petitioner did not begin that work until after the petition's filing date and, therefore, it cannot retroactively show that he was already eligible for the waiver as of the filing date. An applicant or petitioner must establish that he or she is eligible for

the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). Therefore, subsequent events cannot cause a previously ineligible alien to become eligible after the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971).

The remaining two letters are from witnesses who had previously provided letters. [REDACTED] new letter contains some language previously found in his earlier letter (and in [REDACTED] first letter), such as the assertion that the petitioner's "work, particularly a key publication in *Lab on a Chip* – the prestigious journal of the field – became a key factor in the success of our ongoing program." [REDACTED] states that the petitioner's "recent work has concentrated on nanostructured materials considered for future drug delivery systems," but it is clear from [REDACTED] letter that the petitioner has already ceased that work.

The final letter is from [REDACTED] who states:

[The petitioner] mentioned that my previous support letter contains a vague statement reporting that [his] work had a direct impact on my work. In my Review article (*ChemPhysChem* 2007), I clearly chose and mentioned his work as a case of recent direction of research and development which directly impacts on the field of material science and engineering. His research published in *Lab on a Chip* showed programmable chitosan biopolymer film formation by controlling pH condition. It is one of the most intelligent controls of surface properties by external parameter and it is significantly important for biomedical, microsystems, materials science and surface science.

(Emphasis in original.) Despite [REDACTED] stated intention to show how the petitioner's work has influenced his own, his letter fails to achieve this goal. A review article, as the term suggests, presents information about already-reported research in the field. The article that [REDACTED] mentions cites 150 sources. The review article contains two sentences that collectively refer to the petitioner's article and to three other articles: "A recent direction in the research and development of switchable surfaces is the combination of multiple trigger types to stimulate changes in surface wettability. These studies typically combine changes in pH and temperature to modify surface properties." The review article did not single out the petitioner's work as being especially important or influential, and in his new letter, [REDACTED] simply describes the petitioner's past work and declares it, with little elaboration, to be "significantly important."

The letters considered above contain technical descriptions of the petitioner's work, followed by assertions that such work is important and highly recognized, but the letters offer little specific information concerning how the petitioner's contributions have influenced the field. The petitioner did not submit letters from independent references who affirm their own reliance on the beneficiary's work or who were even familiar with his work through his reputation, independent of the petition. The petitioner also failed to submit corroborating evidence in existence prior to the preparation of the petition, which could have bolstered the weight of the reference letters. Claims that the petitioner's

work is influential and recognized have considerably less weight when little or no evidence of that influence and recognition exists until the petitioner solicits it for immigration purposes.

Counsel argues that the director failed to give due consideration to the witness letters in the record. The opinions of experts in the field are not without weight and have been considered above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as we have done above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

Counsel discusses the reputations of the journals that have published the petitioner's articles, and of the conferences where the petitioner has presented his work. The petitioner's work must stand on its own merits; it does not derive influence or importance by association.

Counsel remarks that the petitioner's "work had been referenced and cited in other well recognized scientific journals," while also quoting an unpublished AAO decision to the effect that "heavy citation . . . is not universally mandatory in every national interest waiver case involving published researchers." While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Furthermore, while it is true that heavy citation is not the only means by which an alien can establish the impact of his or her work, when the petitioner's work is only lightly cited, we expect persuasive and objective evidence in place of heavy citation. The petitioner has not met that standard here.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.